No. 89-1752

IN THE

Supreme Court of the United States

October Term, 1989

C. VERNON MASON,

Petitioner,

against

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT; OFFICE OF CHIEF COUNSEL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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June 11, 1990

QUESTION PRESENTED FOR REVIEW

Whether the affirmance by the Second Circuit of the district court's dismissal of petitioner's complaint pursuant to the abstention principles set forth in *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982), was correct when the investigation of petitioner by the Disciplinary Committee's staff, preceding any charges which might be brought against him, is only in its infancy; when petitioner will have an adequate opportunity in any state disciplinary proceedings and state judicial proceedings therefrom to raise constitutional or other challenges to such proceedings; and when petitioner failed to allege facts sufficient to establish bad faith, harassment or other extraordinary circumstances by the Disciplinary Committee to warrant the exercise of federal jurisdiction?

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Respondents, the Departmental Disciplinary Committee of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and the Office of Chief Counsel, ("Respondents"), respectfully urge that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit (the "Second Circuit").[1] Petitioner, C. Vernon Mason, has failed to establish any basis upon which the writ should be granted in that the

[1] The Second Circuit's opinion and judgment are reprinted in the Appendix to the Petition of C. Vernon Mason (the "Petition"), at pages A-1-21. Parenthetical citations preceded by "A" refer to the Appendix to the Petition; those preceded by "J.A." refer the first, second and third volumes of the Record on Appeal filed in the Second Circuit.

Second Circuit's decision is fully consonant with the prior decisions of this Court in *Younger* v. *Harris*, 401 U.S. 37 (1971); *Kugler* v. *Helfant*, 421 U.S. 117, *reh'g denied*, 421 U.S. 1017 (1975); and *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982).

The proceeding that Mr. Mason seeks to enjoin remains only in the most preliminary stage of investigation and no determination has been made by the Committee to seek a disciplinary sanction against Mr. Mason. The procedures established for the conduct of the investigation, the Committee's initial step in the disciplinary process, and for the hearing that would follow in the event formal charges are preferred against Mr. Mason, have been so designed by the State of New York as to protect the substantial interests of all the parties to the litigation.

Pursuant to these procedures, the Committee will have an opportunity to ascertain whether Mr. Mason has violated the standards of professional responsibility which the courts of the State of New York and the people of the State of New York expect its attorneys to maintain. Similarly, Mr. Mason will have an opportunity to explain or to contest any allegations pertaining to his conduct and will have a full and fair opportunity to litigate any perceived infringement of his constitutional rights.

Mr. Mason does not allege facts sufficient to warrant this Court's departure from the general policy of deferring to state courts the discipline of their respective attorneys. Stripped of its conclusory allegations, Mr. Mason's claim appears to be that:

(1) because the Committee alerted New York State Attorney General Robert Abrams to the fact that it had opened an investigation file concerning Mr. Mason and asked to receive relevant evidence against Mr. Mason (in a letter marked "Personal and Confidential");

(2) because Attorney General Abrams publicly announced that he was charging Mr. Mason with conduct violative

of the Code of Professional Responsibility and then publicly disseminated the letter that he was sending to the Committee enumerating the allegations; and

(3) because Justice Francis T. Murphy, in his capacity as Presiding Justice of the Appellate Division, and as such, the Justice empowered to oversee the Committee and the attorney disciplinary process generally, pressed the Committee's then Chief Counsel, Michael Gentile, to move the Mason matter;

he cannot receive a fair and impartial hearing on as yet unbrought charges in the courts of the State of New York, thus violating Mr. Mason's constitutional right to due process.

As shown, Mr. Mason bases this belief on the alleged acts of three individuals—Attorney General Abrams, Justice Murphy and Mr. Gentile—only one of whom, Justice Murphy, may have a role to play in the disciplinary process (and even that possibility is remote). Considering that there is no charge that any of the 36 members of the Committee, the current Chief Counsel or any of the attorneys employed by the Chief Counsel, or, for that matter, that 12 of the 13 Justices of the Appellate Division available to sit on the panel of five to consider such charges (assuming any are brought and referred to the Court), committed any improper acts, Mr. Mason's complaint, on its face, fails to state a claim of bad faith, harassment, or extraordinary circumstances sufficient to warrant the exercise of federal jurisdiction in this case. *See Kugler*, 421 U.S. 117. Denial of the writ, therefore, is appropriate.

STATEMENT OF THE CASE

Solely for purposes of their motion to dismiss and their opposition to Mr. Mason's motion for a preliminary injunction, respondents accepted the facts as set forth in the complaint as true. They are restated here without hyperbole for the convenience of the Court and to demonstrate, by placing them in proper perspective, the lack of any factual or other basis for the relief which Mr.

Mason seeks. Additionally, to place these matters in context, the rules and procedures governing the Committee's investigation and prosecution of disciplinary actions against First Department lawyers are also fully described in the affidavit of its present Chief Counsel, Hal R. Lieberman, previously submitted to the district court and appended hereto in the Supplementary Appendix ("S.A.").

i. **The Brawley Case**

In the autumn of 1987 Tawana Brawley was discovered outside an apartment complex in Wappingers Falls, New York lying inside a garbage bag. At that time, she claimed that she had been abducted and sexually assaulted by several white men, one of whom displayed a policeman's badge. (J.A.I-3.)

Soon thereafter, Mr. Mason and Alton H. Maddox, Jr., Esq., became legal advisers to Ms. Brawley. At their prompting, Governor Mario Cuomo agreed to appoint a special prosecutor to investigate Ms. Brawley's claims of abduction and rape. Governor Cuomo appointed the Attorney General of the State of New York to fill that position. (J.A.I-4.)

Assuming this role, Attorney General Abrams empaneled a Grand Jury in February 1988 to investigate the incident and sought the cooperation of Ms. Brawley and her mother in the investigation. (J.A.I-4, *see also* 72-74.) For approximately eight months, until the Grand Jury issued its report in October 1988, Attorney General Abrams sought, and Ms. Brawley's legal advisers fought, Ms. Brawley's and her mother's participation in the investigation of the alleged crimes. Various charges were hurled by Ms. Brawley's advisers regarding the Attorney General's motivations for seeking the Brawleys' assistance, but, in the end, despite a subpoena from the Grand Jury to Ms. Brawley's mother seeking her appearance, neither Ms. Brawley nor her mother testified before the Grand Jury.

On October 6, 1988, the Grand Jury released the report of its investigation into the matter. (J.A.I-4-5.) The Grand Jury con-

cluded that public charges made by Ms. Brawley's legal advisers and others acting on her behalf, including the charges that certain named individuals had participated in the attack on Ms. Brawley, were without basis in fact.[2]

With the report of the Grand Jury in hand, Attorney General Abrams announced publicly that he would ask the disciplinary committees with jurisdiction over Messrs Maddox[3] and Mason to consider bringing disciplinary proceedings against them. In a letter dated October 6, 1988, Attorney General Abrams set forth his charges against Messrs. Maddox and Mason and alleged that they had breached four Disciplinary Rules of the Code of Professional Responsibility. (J.A.I-4-5.) Attorney General Abrams alleged that the two attorneys knowingly made false statements in the course of representing Ms. Brawley and her mother, counseled Ms. Brawley's mother to disobey a subpoena to appear before a grand jury, and assisted her to evade arrest. (J.A.I-168-77.)

ii. **The Committee's Investigation**

Attorney General Abrams's October 6, 1988 letter to the Committee became part of an existing file on Mr. Mason in this matter. The Committee had opened the file in June 1988 when,

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[2] *See* Report of the Grand Jury of the Supreme Court State of New York, County of Dutchess, Oct. 6, 1988, at 168-69, included at (J.A.II-96-269.)

[3] Mr. Maddox is not subject to the jurisdiction of the Committee, although he did apparently seek to change the venue of his disciplinary hearing to this Committee. Mr. Maddox apparently sought this change because he believed that the Grievance Committee under whose jurisdiction he is, was guilty of racial discrimination, bias and hostility towards him. *See* Matter of Alton H. Maddox, N.Y.L.J., May 22, 1990, at 6, col. 3 (App. Div. 2d Dep't.)

Mr. Maddox also had commenced an action in the Eastern District of New York to enjoin the Grievance Committee (for the Second and Eleventh Judicial Districts) from pursuing its inquiry into his actions with respect to the Tawana Brawley matter. Mr. Maddox, in that action, advanced the claim that he could not receive a fair hearing due to the actions of Attorney General Abrams, which, he claimed, had the effect of biasing the state judicial system against him. That action, too, was dismissed by the district court (Glasser, J.) and sanctions were imposed pursuant to Fed.R. Civ. P. 11. *See Maddox* v. *Mollen*, No. CV-89-4181 (E.D.N.Y. Mar. 28, 1990) (1990 WESTLAW 39869.)

pursuant to 22 NYCRR § 605.6(b)(2), it had commenced a *sua sponte* investigation of Mr. Mason's conduct during the Brawley investigation. (J.A.I-51.) The Committee's investigation was begun as a result of a flood of newspaper articles, television news reports and radio broadcasts about the controversy surrounding the Grand Jury investigation. (*Id.*) Moreover, during this time, the Committee was inundated with telephone calls requesting an investigation of Mr. Mason's conduct. In particular, on June 20, 1988, five members of the Assembly of the State of New York had requested that the Committee commence an investigation of Mr. Mason's conduct because they believed that he and Ms. Brawley's other advisers had acted improperly throughout the investigation. (J.A.I-43-44.)

On June 28, 1988, as part of its normal investigatory procedures, the Committee's then Chief Counsel sent Attorney General Abrams a letter notifying him that it had commenced an investigation of Mr. Mason and requesting the production of relevant materials and documents for possible action following the conclusion of the Grand Jury's investigation. (J.A.I-44.) In this context, Attorney General Abrams's October 6, 1988 letter served to inform the Committee of the termination of the Grand Jury's investigation as well as to register a complaint of professional misconduct against Mr. Mason. Because the letter set forth in detail much of Mr. Mason's purportedly "questionable" behavior (as contrasted with the more general letter previously sent by the Assemblymen), the Committee utilized Attorney General Abrams's letter to serve as the vehicle for conveying to Mr. Mason the conduct about which it was concerned.[4] (J.A.I-45.) The letter did *not* constitute the filing of formal charges by the Committee against Mr. Mason in the sense of institution of a formal proceeding. Rather, as was recognized by the Second Circuit (A-14), it

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[4] This is a customary practice of the Committee when the complainant's letter is clear and specifies those actions which cause the Committee concern. *See* J.A.II-46-47; Practicing Law Institute, *Legal Ethics: Everything a Lawyer Needs to Know and Should Not be Afraid to Ask*, 191 (1988).

was no more than an instrument which the Committee used to further its investigation pursuant to 22 NYCRR § 605.6.[5] The Committee requested that Mr. Mason respond to its inquiry within the standard 20 days (by November 4, 1988). (J.A.I-45.)

On November 2, 1988, the Committee received a letter from Napoleon B. Williams, Jr., Esq. and Stephanie Y. Moore, Esq. requesting, on behalf of Mr. Mason, a 90 day extension of time to answer the concerns raised in Attorney General Abrams's letter. In large part because their letter was equivocal as to their authority to represent Mr. Mason (*see* J.A.I-155), the Committee the next day denied the request and, in its letter so informing Mr. Williams and Ms. Moore, sought to clarify whether they in fact were authorized to represent Mr. Mason. (J.A.I-46.) Mr. Williams, on November 4, 1988, purportedly on Mr. Mason's behalf, submitted a response. (J.A.I-99.)

Within ten days, there commenced an exchange of correspondence, initially between the Committee and Mr. Mason, and eventually involving new counsel, William M. Kunstler, Esq. and Ronald L. Kuby, Esq., and Ms. Moore. (J.A.I-107.) In sum, Mr. Mason's new counsel attempted to withdraw the response submitted by Mr. Williams and to obtain an extension of time to submit a new response. The Committee sought to determine who represented Mr. Mason during this period, to advise him that Ms. Moore, having never been admitted to practice in New York, could not act as counsel to him, and declined to allow him to withdraw the November 4, 1988 response, at least absent adequate explanation. Mr. Mason's new counsel advised the Committee that they had counseled Mr. Mason not to answer any inquiries regarding Mr. Williams's representation.

On December 8, 1988, the Committee reiterated to Mr. Mason that it would not allow him to withdraw his response of No-

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[5] In the event that the Committee formally charges Mr. Mason with misconduct, it will prepare and serve a formal Notice and Statement of Charges and Attorney General Abrams's letter will no longer be legally relevant. *See* 22 NYCRR § 605.12.

vember 4, 1988, but that it would give him until January 9, 1989 to submit a supplemental response. (J.A.I-7.) Mr. Mason rejected the Committee's offer and also insisted that Ms. Moore should be allowed to act as counsel in the matter. On December 20, 1988, he commenced a proceeding in the Appellate Division pursuant to Article 78 of the New York Civil Practice Law and Rules ("Article 78 proceeding") against the Committee for a judgment directing the Committee to grant him an extension of time to respond to Attorney General Abrams's letter of complaint and to recognize Ms. Moore as one of his attorneys.[6] (J.A.I-7-8.) The Committee responded by cross-moving for dismissal of the entire action.

On January 5, 1989, Mr. Mason commenced a second Article 78 proceeding in the Appellate Division against the Committee (J.A.I-10-11), apparently as a result of the reports of the requested resignation of the Committee's then Chief Counsel, Michael A. Gentile. (J.A.I-10.) By this action, Mr. Mason sought an order directing the Committee to cease the investigation into Mr. Mason's activities, charging that the investigation was biased and violative of his right to due process, and directing the Committee to disclose any and all information regarding communications between Mr. Gentile and Attorney General Abrams concerning the investigation into Mr. Mason's activities. (J.A.I-10-11.)

The parties agreed to consolidate these actions and the Committee subsequently responded to the second action by cross-moving to dismiss it, as well as the first, on both procedural and substantive grounds. (J.A.I-320-22.)

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[6] The very next day, Mr. Mason submitted a complaint to the Committee against Attorney General Abrams regarding the latter's publication of the allegations against him. Oddly enough, Mr. Mason publicized the filing of the complaint. (J.A.II-46.) After a full investigation, the Committee, in June 1989, determined that there was no basis for taking action. (J.A.III-155.)

Mr. Mason's complaint, Attorney General Abrams's answer, Mr. Mason's response and the Committee's determination were submitted under seal to Judge Sprizzo and the Second Circuit prior to these courts' determinations in the matter.

On February 22, 1989, the Appellate Division rendered decisions in both Article 78 proceedings. In the first, the court essentially granted the entire relief Mr. Mason had sought. The court allowed him 60 days to submit a response to the complaint filed by Attorney General Abrams and, while declining to then approve Ms. Moore's status as counsel, indicated that Ms. Moore would be permitted to represent Mr. Mason upon submission of a proper application for *pro hac vice* admission. (J.A.I-453.) In the second, it rendered a decision dismissing Mr. Mason's petition (and charges of conspiracy and due process violations) without opinion. (J.A.I-455.)[7] The Committee then renewed its efforts to continue its investigation. As the time drew near for Mr. Mason to respond to the allegations and to appear for a deposition before the Committee, he instituted this action. (J.A.I-48.) The parties stipulated before the district court that Mr. Mason's response and appearance would be deferred pending the district court's determination. As also stipulated, the investigation, to the limited extent possible, continued.

iii. **The Gentile Matter**

As referenced above, at the request of Justice Murphy, Mr. Gentile resigned his position on January 23, 1989, effective March 1, 1989. (J.A.I-409.) Initially, the media reported that the request for the resignation was due to Mr. Gentile's alleged mishandling of another investigation and disciplinary proceeding. (J.A.I-10.) However, subsequent reports in the press indicated that there were additional reasons for the requested resignation. By the end of January 1989, there was speculation in the press that Mr. Gentile's resignation was requested because of inadequate performance in connection with various investigations, including that of Mr. Mason. (J.A.I-11.)

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[7] Approximately one month later, on March 23, 1989, Mr. Mason sought leave from the New York Court of Appeals to appeal the Appellate Division's determinations. (J.A.I-426-450.) On May 4, 1989, Mr. Mason's motion for leave to appeal was denied. (J.A.I-18-19.) Mr. Mason, to the Committee's knowledge, did not seek certiorari.

In an effort to quell the rising tide of speculation, Justice Murphy released a report on January 23, 1989 explaining why he had requested Mr. Gentile's resignation. As is evident from that report, Justice Murphy was concerned that the Committee was not being properly administered, that a backlog of cases was growing, and that the increasing backlog of cases was causing many cases to slip through without thorough investigations occurring. (N.Y.L.J., Jan 31, 1989, at 24, col. 2.)

Mr. Gentile countercharged that this was not the case. He conclusorily alleged that Justice Murphy had attempted to interfere with the investigation of Mr. Mason so as to deprive Mr. Mason of the same due process rights afforded any other lawyer under investigation. (J.A.I-13.) On January 23, 1989, Mr. Gentile filed a complaint with the New York State Commission on Judicial Conduct against Justice Murphy and the Chief Clerk of the Court. (J.A.I-13-14.)

On February 16, 1989, Chief Judge Wachtler of the New York Court of Appeals directed the Appellate Division, First Department to "make inquiry with respect to the entire situation and promptly do whatever is necessary to maintain the dignity, respect and integrity" of the Court and its Committee. (N.Y.L.J., Feb. 16, 1989, at 1, col. 3; *see* J.A.I-473.) The Appellate Division thereupon commenced an inquiry into the matter. All of the 12 associate justices of the Appellate Division participated in the questioning of the various witnesses called to testify during the inquiry. Among those called as witnesses were Justice Murphy, Mr. Gentile, the Chief Clerk of the Court, who had resigned during the investigation, and Mr. Gentile's former assistant who had also resigned. (J.A.I-17.)

On April 28, 1989, the Appellate Division issued the report of its internal investigation. But for a lone dissenter, who objected to the manner of Mr. Gentile's resignation, all of the other Appellate Division Justices found that Justice Murphy had acted properly and that he had not improperly participated in the

investigation, prosecution or disposition of *any* disciplinary matter. (J.A.I-18.) Chief Judge Wachtler, on behalf of the Court of Appeals, accepted the report and sent a letter expressing the Court of Appeals's satisfaction with the Appellate Division's report. (*See* J.A.I-18 and J.A.II-276-277.)

ARGUMENT

ESTABLISHED SUPREME COURT PRECEDENT COMPELS ABSTENTION IN THE INSTANT MATTER AND DENIAL OF THE WRIT OF CERTIORARI

Petitioner has failed to establish any basis for this Court to grant his petition for a writ of certiorari.[8] The only basis upon which he appears to claim that this Court should grant the writ is that the Second Circuit "decided a federal question in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1. In fact, the Second Circuit's decision is entirely consistent with this Court's prior decisions in *Younger* v. *Harris*, 401 U.S. 37 (1971), *Kugler* v. *Helfant*, 421 U.S. 117 (1975), and *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982).

A. The Principles Of Abstention As Set Forth In *Younger* And Applied In *Middlesex* Govern The Instant Matter

In *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, Lennox Hinds, a New Jersey attorney who was serving as executive director of the National Conference of Black Lawyers, participated in a news conference at the outset of the trial of Joanne Chesimard for the murder of a policeman. During the course of the conference, Hinds made statements critical of the

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[8] Petitioner mistakenly asserts that this Court's jurisdiction is based on 28 U.S.C. §1257, which is concerned with appeals from state courts. The basis of this Court's jurisdiction is 28 U.S.C. §1254.

trial and the trial judge, at one point labeling the trial as a "travesty" and a "legalized lynching." *Id.* at 428.

The attorney's behavior was brought to the attention of the ethics committee and an investigation was commenced. At the conclusion of its investigation, the ethics committee determined that there was probable cause to believe that the attorney had violated certain Disciplinary Rules of the Code of Professional Responsibility and thus served the attorney with formal charges. Instead of responding to the charges, the attorney filed suit in federal court in New Jersey. That court dismissed the case based on *Younger*. The Third Circuit Court of Appeals reversed, reasoning that the disciplinary proceeding would not provide the attorney with an opportunity to fully litigate his constitutional claims. *Garden State Bar Ass'n* v. *Middlesex County Ethics Comm.* 643 F.2d 119, *reh'g denied*, 651 F.2d 154 (3d Cir. 1981). This Court reversed.

This Court declared that the policies underlying *Younger* are fully applicable to disciplinary proceedings when the answers to the following questions are in the affirmative:

> [F]irst, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

457 U.S. at 433. Here, the answers are all in the affirmative, thus the decisions of the courts below are entirely consonant with the precedent of this Court. *See Trainor* v. *Hernandez*, 431 U.S. 434, 447 (1977).[9]

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[9] *See also Juidice* v. *Vail*, 430 U.S. 327 (1977); *Kugler* v. *Helfant*, 421 U.S. 117 (1975); *Davis* v. *Lansing*, 851 F.2d 72 (2d Cir. 1988); *Anonymous* v. *Ass'n of the Bar, 515 F.2d 427 (2d Cir.), cert. denied*, 423 U.S. 863 (1975) (all cases affirming dismissal upon application of *Younger*).

As to the first of these questions, petitioner now concedes that the conduct of disciplinary proceedings in New York clearly constitutes judicial proceedings. *See* Petition at 29 n.13; *see also Zimmerman* v. *Grievance Comm.* 726 F.2d 85, 86 (2d Cir.), *cert. denied*, 467 U.S. 1227 (1984); *Erdmann* v. *Stevens*, 458 F.2d 1205, 1208-09 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); *Mildner* v. *Gulotta*, 405 F. Supp. 182, 191 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1976). As to the second question, petitioner also concedes that the exercise of this authority is in the pursuit of an extremely important interest to the State of New York, the maintenance of the professional conduct of the attorneys it licenses. *See* Petition at 29 n.13. As this Court noted in *Middlesex*, states have traditionally exercised extensive control over the professional conduct of their attorneys in an effort to protect the judicial system and the public from unethical conduct by attorneys. *See* 457 U.S. at 435.

It is in response to the third question that petitioner joins issue, contending that he will not have an opportunity to raise his claims that various persons acted improperly in the state proceedings. This, however, confuses the issue at bar. For the issue is not whether the focus of the inquiry should be on the wrongful conduct of other parties, *see* Petition at 27; rather the issue is whether the petitioner, in confronting allegations made against him, is offered the opportunity in the state proceedings to raise any constitutional defenses. Here, Mr. Mason is free to raise in the state disciplinary proceedings any perceived violations of his constitutional rights, Federal or State, whether with respect to the disciplinary rules on their face or in their application to him. New York courts have clearly established that Mr. Mason may raise constitutional issues before the Committee in answering any formal charges brought against him, before a hearing panel of Committee members, before the Appellate Division, before the New York Court of Appeals and, possibly, before this Court. *See Turco* v. *Monroe County Bar Ass'n*, 554 F.2d 515, 519 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Anonymous*, 515 F.2d at 432; *Erdmann*, 458 F.2d at 1211; *Matter of Capoccia*, 59 N.Y.2d 549,

553, 453 N.E. 2d 497, 498 (1983); *Anonymous Attorneys* v. *Bar Ass'n*, 41 N.Y.2d 506, 509-12, 362 N.E.2d 592, 594-97 (1977).

Thus, the policies underlying *Younger* are fully applicable in the instant matter. In *Younger*, this Court emphasized the basic doctrine of equity jurisprudence "that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." 401 U.S. at 43-44. *Accord Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 600-01, *reh'g denied*, 421 U.S. 971 (1975). This policy is reinforced "by an even more vital consideration, the notion of 'comity', that is, a proper respect for state functions . . . ." *Younger*, 401 U.S. at 44. As the Court stated in *Dombrowski* v. *Pfister*, 380 U.S. 479, 485 (1965), it is generally to be presumed that state courts and prosecutors will observe constitutional limitations.[10]

Beyond its confidence that the state courts will abide by the Constitution, this Court has encouraged abstention as part of a "scrupulous regard [for] the rightful independence of state governments." *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977) (quoting *Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 50 (1941)). Thus, this Court clearly teaches that the relief sought here should not be granted

> except under extraordinary circumstances, when the danger of irreparable loss is both great and immediate. . . . The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.

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[10] Mr. Mason claimed below that one of the irreparable harms that he would suffer if the district court's dismissal of this case is affirmed is that he would be required to litigate his Constitutional claims in state court. (J.A.II-24.) As is apparent from *Dombrowski* and successive opinions of this Court, such a claim does not suffice to warrant the exercise of federal jurisdiction. The Court has repeatedly expressed confidence that state courts will exercise their authority consistent with the supremacy clause. *See, e.g., Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 15 (1987).

Younger, 401 U.S. at 45 (quoting *Fenner* v. *Boykin*, 271 U.S. 240, 243-44 (1926); *see also Huffman*, 420 U.S. at 601; *Davis*, 851 F.2d at 76.

B. Petitioner's Claims Fail To Establish The Bad Faith Of The Committee In Commencing This Action, Harassment Or Extraordinary Circumstances Warranting The Exercise Of Federal Jurisdiction

There is no dispute that *Younger* permits federal intervention where there is a showing of bad faith or harassment by state officials responsible for the prosecution, where the state law to be applied is flagrantly and patently violative of express constitutional provisions, or where there exists extraordinary circumstances which create irreparable harm to Mr. Mason. *See* 401 U.S. at 54; *see also Kugler*, 421 U.S. at 124.[11] The dispute in the instant matter is whether petitioner adequately pleaded *facts*—not innuendo and conclusions—that show that the Committee was proceeding against him in bad faith. The courts below correctly ruled in the negative.

First, as a preliminary matter (and as the only new matter raised in the Petition), Mr. Mason argues that the courts below utilized too stringent a standard in rejecting his request for a preliminary injunction. Mr. Mason contends that "(his) overwhelming objective evidence of misconduct and bias" should have shifted the burden to the Committee to rebut the inference of prejudice. *See* Petition at 41. The problem for petitioner, how-

[11] Petitioner does not allege that the state law to be applied is unconstitutional.

ever is that he totally fails to show facts of bias.[12] In the instant matter, the Second Circuit concluded upon a review of the entire record that a showing of bias was lacking. It declared:

> In sum, Mason has alleged **no circumstances** that show that the Committee or the state courts are proceeding against him in bad faith or harassing him, nor has he alleged any other valid grounds for an exception to *Younger* abstention. The District Court was entirely correct in its conclusion that Mason's complaint did not require an evidentiary hearing and that the complaint should be dismissed.

(A-19-20) (emphasis supplied.)[13]

Shorn of the complaint's conclusory allegations, petitioner's claim, as best it can be parsed, is that the acts or statements of

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[12] Petitioner's reliance on *Lewelien* v. *Raff*, 851 F.2d 1108 (8th Cir. 1988), *cert. denied*, ____U.S.____, 109 S. Ct. 1171 (1989); *Smith* v. *Hightower*, 693 F.2d 359 (5th Cir. 1982); and *Wilson* v. *Thompson*, 593 F.2d 1375 (5th Cir.), *reh'g denied*, 597 F.2d 772 (1979), thus is to no avail. In these cases, the courts, in considering whether a preliminary injunction should issue, first required the movant to show that an impermissible purpose motivated the prosecution sought to be enjoined. *See Lewellen*, 851 F.2d at 1110; *Smith*, 693 F.2d at 367; *Wilson*, 593 F.2d at 1382-3. Here, Mr. Mason has made no such showing; all that he offers are unsupported—and insupportable—inferences of misconduct and speculative conclusions that he claims prove the case. However, *Smith* v. *Hightower*, 693 F.2d 359, itself, cautions against confusing "rumor and gossip" with facts (693 F.2d at 374), and the use of "pyramidal inferences" (*id.* at 370), stating: "[w]e are concerned that district courts not allow the bad faith or retaliatory prosecution exception to the *Younger* doctrine to swallow the rule of that case." *Id.* at 375.

[13] Moreover, even under the traditional injunction analysis, Mr. Mason's application for such relief below must fail. The first requirement—that appellant be faced with imminent and irreparable injury—simply is not present here. As explained in the Lieberman Affidavit, the Committee's investigation of Mr. Mason is in its infancy. (S.A.-8) There have been no charges brought against Mr. Mason and, depending upon the results of the Committee's investigation, there may never be any. (S.A.-8) Moreover, as set out at length in the Lieberman Affidavit, Mr. Mason will have an opportunity at each and every stage of the disciplinary process—before the Chief Counsel's office, before the Committee, and before the Courts—to raise defenses, constitutional or otherwise, to any charges that may be filed against him. (S.A.-7-9) Thus, we cannot help but conclude, this action is but a ruse to prevent Mr. Mason's conduct from ever being investigated by an appropriate disciplinary body.

former Chief Counsel Gentile, Attorney General Abrams and Justice Murphy manifested such bad faith that Mr. Mason now will not be able to obtain a fair and impartial hearing on his disciplinary matter. Even assuming the good faith of Mr. Mason's claim, that standing alone is insufficient to warrant the exercise of federal jurisdiction. *See Kugler*, 421 U.S. at 126-27; *Erdmann*, 458 F.2d 1205. Thus, the sufficiency of Mr. Mason's complaint must be measured by the specific allegations contained therein and whether those allegations, if true, constitute bad faith, harassment or extraordinary circumstances.

1. Bad Faith, Harassment and Extraordinary Circumstances

Petitioner has the burden of showing that one or all of the exceptions apply. It is a heavy burden: "The bad faith exception is narrow and is to be granted parsimoniously." *Hensler* v. *District Four Grievance Comm.*, 790 F.2d 390, 392 (5th Cir. 1986). The complaint alleging bad faith, harassment or extraordinary circumstances must be examined closely for specific facts to support these exceptions and thus the establishment of irreparable harm. In *Collins* v. *County of Kendall*, 807 F.2d 95 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987), the court declared:

> 'The *Younger* rule, as applied in *Hicks* (v. *Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed. 2d 223 (1975)), requires more than a mere allegation and more than a 'conclusory' finding to bring a case within the harassment exception.'

Id. at 98, (quoting *Grandco Corp.* v. *Rochford*, 536 F.2d 197, 203 (7th Cir. 1976).)

In *Kugler*, this Court stated that bad faith in this context "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." 421 U.S. at 126, n.6; *see also Dombrowski*, 380 U.S. at 482; *Davis*, 851 F.2d at 77. The plaintiff must allege "far more than an 'injury incidental

to every criminal proceeding brought lawfully and in good faith. . . .' " *Dombrowski*, 380 U.S. at 489, 487-89.

2. Petitioner's Claims

Petitioner's allegations fall far short of the above standards. He does not claim that the Committee's investigation of Attorney General Abrams's complaint is part of a long-standing campaign by the Committee to deprive him of his rights. Rather, Mr. Mason now conclusorily alleges a series of acts—

(1) the Attorney General of the State of New York publicly released a ten-page complaint against Mr. Mason charging him with professional misconduct in a highly political, racially sensitive case and called upon the state's Disciplinary Committee to impose disciplinary sanctions;

(2) the Presiding Justice of the Appellate Division of New York, in reaction to the Attorney General's publication, sought to pressure the presumably independent Chief Counsel of the Disciplinary Committee to lodge formal charges immediately against Mr. Mason;

(3) the Chief Counsel of the Disciplinary Committee was subsequently ousted by the Presiding Justice, in part, because of the Presiding Justice's disapproval of his handling of the underlying disciplinary investigation of Mr. Mason;

(4) the former Chief Counsel filed a formal complaint against the Presiding Justice with the State Commission on Judicial Conduct alleging, *inter alia*, that the Presiding Justice improperly interfered with the underlying disciplinary investigation of Mr. Mason;

(5) the Court of Appeals for the State of New York ordered the Appellate Division to investigate the charges;

(6) the independent investigations by the State Commission on Judicial Conduct and the Appellate Division were conducted in secret without providing Mr. Mason or his counsel

an opportunity to confront the evidence or examine the witnesses to determine whether his rights had been violated; and

(7) the Court of Appeals accepted and endorsed the conclusion of the Appellate Division's self-examination that no unethical conduct had occurred without reviewing the underlying evidence on which the conclusion is based;

Petition at 30-32 —acts which, viewed in context, as presented *supra*, at 5-11 and discussed below, in no way exhibit bad faith.

Unlike any of the cases cited by petitioner, in the instant matter, the "undisputed evidence" of bias cited by petitioner does not refer to any actions taken by the Committee, the current Chief Counsel or to anyone who is charged with determining whether any charges should be brought against him. Mr. Mason can point only to the actions of three individuals, Justice Murphy, Mr. Gentile and Mr. Abrams, and to the determinations of the Court of Appeals and the Appellate Division that their acts did not prevent an investigation of his conduct. Mr. Gentile is no longer counsel to the Committee. Attorney General Abrams is not on the Committee and has no connection with the operations or administration of the Committee. Justice Murphy is not involved in the investigation and may never be involved in the matter.

The conduct of the Attorney General cited by petitioner was completely independent of any acts of the Committee.[14] Mr. Gentile's and Justice Murphy's exchange of allegations, with respect to the Mason matter, amounts to no more than Mr. Gentile claiming that Justice Murphy was trying to pressure him to move the

[14] Petitioner totally mischaracterizes the evidence presented when he characterizes the Committee as the "catspaw" of the Attorney General. The uncontroverted evidence below shows that the investigation into Mr. Mason's behavior was initiated because of numerous complaints from many parties, including a letter complaint by five members of the New York State Legislature. (Petition at 55-56.) Moreover, as the Second Circuit points out, the Committee has adopted nothing of what the Attorney General has said, except to ask for a response to his allegations. (A-14.)

matter more quickly than Mr. Gentile believed appropriate. Even if these allegations are true, the lack of progress in the investigation as of the commencement of this action, reveals that it did not result in actual prejudice to Mr. Mason and there is now a new chief counsel. (*See* S.A.-1, 9.)

The Second Circuit succinctly responded to this entire argument when it stated:

> Nor is bias shown by the allegations concerning the resignation of Gentile, the role of Justice Murphy in such resignation, or any state inquiry into such matters. **It is wholly speculative for Mason to conclude that the members of the Committee or its current staff have prejudged him, or are incapable of impartially deciding whether to initiate formal proceedings, and, in that event of conducting them fairly.** Finally, no sufficient claim of bias is shown by the fact that the Committee has rejected Mason's claim of bias, nor by the state court's refusal to halt the Committee's efforts to ascertain whether grounds exist for formal charges. **Obviously state forums do not disable themselves from investigating and adjudicating matters simply by disagreeing with accusations made against them.**

(A-14-5) (emphasis supplied.)[15]

The cases relied upon by petitioner, finding "bad faith," are inapposite to the present situation. In *Bishop* v. *State Bar*, 736 F.2d 292 (5th Cir. 1984), cited at pages 52-55 of the Petition, the plaintiff attorney alleged that the Texas State Bar had prosecuted

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[15] Petitioner, like the plaintiff in *Smith* v. *Hightower*, discussed *supra*, at 16, n. 12, is fond of relying upon rumor to try to carry his burden. For example, petitioner sets forth as fact a press report that an unnamed source had questioned the vigor of the Appellate Division's review of Justice Murphy's and Mr. Gentile's conduct. (*See* Complaint, ¶ 45 at A-78.) Whether it be regarding the court's inquiry or the Attorney General's motives in filing the complaint against Messrs. Mason and Maddox, petitioner's charges are entirely speculative as is well illustrated by the constant refrain preceding his allegations stating "Published accounts reported . . . ;" "Published accounts further indicated . . . ;" and references to as " . . . described by an unnamed source . . . ." *See* Petition at 20-21.

him in bad faith in successive disciplinary proceedings for almost eight years. He further alleged that the prosecutions themselves suffered from many due process violations. The court, finding the case analogous to *Dombrowski*, apparently also believed that the proceedings were instituted to deter constitutionally protected conduct.

The facts here are very different. There are no allegations that the Committee has engaged in a pattern of patently improper proceedings against Mr. Mason. Nor has Mr. Mason pleaded facts which reflect an effort on the part of the Committee to "chill" Mr. Mason's exercise of his rights. *See Huffman*, 420 U.S. at 601-02; *Younger*, 401 U.S. at 47; *Erdmann*, 458 F.2d at 1211. Mr. Mason simply complains about the manner in which the Committee has thus far conducted its investigation into his conduct related to his representation of the Brawleys. While there may be "costs, anxieties and inconvenience" during this investigation, not only are they those that normally occur when such grave matters are involved, but, as Mr. Mason himself has conceded, he is obligated, as a member of the bar, to cooperate in the investigation. (*See* J.A.II-16.)

Moreover, Mr. Mason, continues to practice and has been afforded an opportunity to respond to the charges made against him. Further, the Committee and the courts stand ready to consider Mr. Mason's constitutional concerns. Finally, far from expressing hostility to Mr. Mason, the Appellate Division already has ruled against the Committee in the state proceeding regarding Mr. Mason's right to withdraw the response submitted by Mr. Williams and to have additional time to submit another.

Wichert v. *Walter*, 606 F. Supp. 1516 (D.N.J. 1985), cited at pages 25 and 27 of the Petition, also does not advance Mr. Mason's charge of bias against the Committee. There, a school teacher sought to enjoin a tenure revocation proceeding commenced against him. The teacher claimed that he was the subject of a disciplinary proceeding because he had participated in a po-

litical rally in opposition to the political party which controlled the school board. The teacher's unrebutted affidavit set forth a pattern of political actions taken against members of his political group. Furthermore, the record failed to indicate a legitimate basis for the charges against the teacher, prompting the court to find them "patently meritless." *Id.* at 1522.

Again, that situation is plainly distinguishable from the case at bar. The allegations made by Attorney General Abrams (and others) are quite specific and detailed, referencing not only specific behavior and language but also particular rules which were purportedly violated. Thus, it certainly cannot be said that the charges are patently meritless or that they were brought with " 'no genuine expectation' of their eventual success, but only to discourage the exercise of the appellant's protected rights." *Id.* at 1521. Moreover, there are no allegations that Attorney General Abrams, or, for that matter, the Committee or the state judiciary, has been engaged in a pattern of conduct to deprive civil rights activists like Mr. Mason of their constitutional rights.

Kugler v. *Helfant*, 421 U.S. 117 (1975), practically ignored by petitioner, is far more relevant to the disposition of the instant matter. There, this Court considered a claim analogous to Mr. Mason's that the plaintiff, a municipal court judge, could not obtain a fair hearing in a criminal matter because the state prosecutors and the Court had conspired to deprive him of his rights.

In *Kugler*, the state judge had been called to testify before a grand jury investigating his activities while he was on the bench. During his testimony, he invoked his Fifth Amendment rights against self-incrimination. He subsequently was recalled to testify before the grand jury. The day before this was to occur he was called to meet with the Chief Justice as well as the other Justices of the New Jersey Supreme Court. There followed a meeting in which it was suggested that it was inappropriate for a sitting judge to invoke his Fifth Amendment privileges before a grand jury and that a disciplinary investigation might be in order. The next day

the judge testified before the grand jury and did not exercise his Fifth Amendment rights. Shortly thereafter, the grand jury issued a state indictment against the judge for obstruction of justice and false swearing.

In his federal complaint seeking relief under 42 U.S.C. § 1983, the judge alleged that he had been coerced into giving his testimony by a concerted effort of the assistant attorney general and the members of the Supreme Court of New Jersey. Due to this improper activity, he alleged, it would be impossible for him to receive a fair hearing on his federal constitutional claims in the New Jersey courts, particularly if convicted, when the very same Supreme Court that he contended acted to deprive him of his rights would be called upon to review the matter. *See id.* at 122. He claimed that these facts established bad faith and created the extraordinary circumstances which allowed the exercise of federal jurisdiction under *Younger*.

This Court rejected these arguments, ones far more substantial than those at bar. While recognizing that the New Jersey Supreme Court (and particularly the Chief Justice) exercised considerable administrative authority over the entire judicial system in New Jersey, the Court stated that the objectivity of the entire New Jersey court system could not be impugned because of the pleaded actions. First, the Court pointed out, an affected judge could recuse himself. Second, absent recusal, the plaintiff could seek to have the judge disqualified. *Id.* at 127. Finally, the Court noted that several members of the State Supreme Court who had met with the plaintiff were no longer on the bench, thus mitigating any taint that may have arisen.

Here, too, the Committee's former Chief Counsel, who allegedly had conspired against Mr. Mason, no longer is in office; instead, a new Chief Counsel—one who has not been accused by plaintiff of any wrongdoing—is in charge of the investigation. Further, if a proceeding is brought against Mr. Mason and is referred to the Appellate Division, Mr. Mason would have the right

to seek the recusal of any justice that he believed lacked partiality. Thus, under *Kugler*, the instant complaint was appropriately dismissed. *Accord Erdman*, 458 F.2d at 1207, 1210-12 (plaintiff lawyer had called state judges "whores" and "madams"; Second Circuit dismissed federal action brought under the civil rights statutes to enjoin state disciplinary proceeding, finding plaintiff's "conclusory charges" of inability to obtain a fair hearing in state court system insufficient under *Younger* to withstand abstention).

C. There Was No Need For An Evidentiary Hearing

Finally, Mr. Mason contends that the court below erred in at least not holding an evidentiary hearing. However, as Judge Sprizzo and the Second Circuit recognized, the Committee, tnough only for purposes of the motion for a preliminary injunction, assumed that the material factual allegations in the verified complaint were correct. Thus, there were no material issues of fact in dispute to warrant an evidentiary hearing, though, as would be expected, the parties differed as to the reasonable conclusions to be drawn from petitioner's statement of the facts. Accordingly, an evidentiary hearing was properly regarded as unnecessary by the courts below.

CONCLUSION

The proceedings against Mr. Mason are still at the investigatory stage. The Committee has not brought formal charges against petitioner. A denial of certiorari, therefore, will not terminate the matter: the Committee will continue its investigation and if no charges are warranted, the matter will be concluded; if charges are brought, a disciplinary proceeding with full due process protections will follow.

Furthermore, petitioner's complaint does not allege a sufficient basis either to establish bad faith or harassment by the Committee or to impugn the integrity of the entire State judicial system. Thus, the Second Circuit correctly affirmed the decision of the district court which determined that the complaint failed to meet the stringent standards established by this Court in *Younger*

and *Middlesex*, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 11, 1990

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C. VERNON MASON,

Plaintiff,

-against-

DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT; Office of Chief Counsel,

Defendants.

89 Civ. 3598 (JES)

AFFIDAVIT

STATE OF NEW YORK)
: ss. :
COUNTY OF NEW YORK)

HAL R. LIEBERMAN, being duly sworn, deposes and says:

1. I am Chief Counsel to the Departmental Disciplinary Committee for the First Judicial Department (the "Committee"), having been appointed to said position effective May 15, 1989. On January 9, 1989, I became Acting Chief Counsel upon the resignation of the former Chief Counsel, Michael A. Gentile. I joined the Office of Chief Counsel to the Committee in June, 1987 as Principal Attorney. Prior to my appointment by the Committee, I have held various public interest legal positions for the past twenty years, including service as a staff attorney, managing attorney and project director for three legal services agencies, as as-

sociate appellate counsel in the criminal appeals bureau of the Legal Aid Society of New York, and, between 1983—1987, as a senior litigation attorney with the Office of the Bar Counsel for the Supreme Judicial Court of the Commonwealth of Massachusetts, the equivalent of the Committee in the First Department. I currently hold the title of Adjunct Professor of Law at Brooklyn Law School and New York Law School where I teach "Professional Responsibility."

2. I offer this affidavit not to contest the many conclusory charges made in plaintiff's papers (though I believe them to be insupportable), but to explain the workings of the attorney disciplinary process in the First Department. Once the proceedings and practices of the Committee are properly understood, it is my belief that the Court, in considering the facts pleaded by plaintiff, will see that plaintiff has failed even to approach the showing required of him to fall within any of the limited exceptions to the *Younger/Middlesex* mandate of abstention.

3. Under § 90(2) of the New York Judiciary Law, the Appellate Division of each judicial department in New York is given the exclusive power to hear and resolve charges of attorney misconduct pertaining to attorneys practicing within the department. The Appellate Division, First Department, appoints a Committee which is charged with the duty and empowered to investigate and prosecute matters involving alleged misconduct by attorneys and to impose non-public discipline as appropriate. The Committee is made up of 36 persons, each of whom is appointed by the First Department for a term of three years and two-thirds of whom are attorneys. Appointments to the Committee are made by the Court based upon lists of nominees furnished by various bar associations and other sources.

4. The Appellate Division, First Department, in consultation with the Committee, appoints a Chief Counsel to the Committee. (*See* 22 NYCRR § 603.4). The First Department also has promulgated the Rules and Procedures of the Committee

(Part 605 of 22 NYCRR) which rules govern the conduct of disciplinary proceedings (the "DDC Rules"). In reviewing below the procedures prescribed therein and the attendant practices of the Committee, the Court will be able to see that the rights of C. Vernon Mason, Esq. have not been abridged in the limited developments to date and would in the future be adequately protected through this process.

5. Pursuant to the DDC Rules, the Office of Chief Counsel is empowered to undertake an investigation of all matters involving alleged misconduct of attorneys within the First Department. (*See* 22 NYCRR § 605.6). Investigations of professional misconduct may be commenced upon receipt of a specific complaint by the Committee or the Court, or may be commenced *sua sponte* by the Committee or the Court. (*See* 22 NYCRR § 603.4(c)). In this case, by virtue of the numerous media reports and inquiries regarding the conduct of Mr. Mason in connection with the Tawana Brawley matter, the Committee, in June of 1988, *sua sponte* opened a file for investigation. I first became involved in the Mason investigation and reviewed the file when I became Acting Chief Counsel in January, 1989.

6. Once a file has been opened, the Chief Counsel, pursuant to section 605.6(c), is authorized to make "such investigation of each Complaint as may be appropriate." It is standard practice, as part of an investigation, to contact other prosecutorial agencies, state and/or federal, to elicit information about the subject of the misconduct charges, assuming, of course, that the particular agency would be likely to have information relevant to our investigation that is not under seal. The transmittal of the June 28, 1988 letter from Mr. Gentile, former Chief Counsel to the Committee, to Attorney General Robert Abrams, about which plaintiff makes much ado, was well within the norm of routine practice.

7. That the June 28, 1988 letter was designated "PERSONAL AND CONFIDENTIAL," as to which plaintiff insinuates some form of conspiratorial motive (*see* Complaint, ¶ 21, at

9), again is a standard procedure. I note that counsel for plaintiff themselves, in communicating with the Committee, have adopted the same convention. (*See, e.g.*, Plaintiff's Appendix ("A"), at 000092, 000143).

8. Where the attorney in question is involved in parallel proceedings, particularly of a criminal nature, it is also common for this Office to defer an investigation until the completion of those proceedings, and our rules provide for such deferral as a matter of discretion in appropriate circumstances. (*See* 22 NYCRR § 605.9(b)(1)). Here, then, it was by no means out of the ordinary for Mr. Gentile to indicate in the same letter to Attorney General Abrams that this Office would "await outcome of the grand jury's inquiry before proceeding further."

9. According to media reports, with the conclusion of the Brawley grand jury's inquiry, and in fact at a press conference disclosing the grand jury's findings, Attorney General Abrams announced that in connection with those findings he was forwarding allegations of professional misconduct against Mr. Mason (and Alton H. Maddox, Jr., Esq.) to the appropriate disciplinary bodies. At the same conference he also distributed copies of a letter setting forth in detail the nature of his allegations. This ten-page letter, dated October 6, 1988, was, after review by our staff, forwarded to Mr. Mason on October 14, 1988 for response within the 20-day period provided by section 605.6 of the DDC Rules.

10. Plaintiff charges that Attorney General Abrams's publication of his allegations was wrongful and that the Committee acted improperly in utilizing the October 6, 1988 letter of complaint as the vehicle to notify Mr. Mason of the allegations brought against him and as to which he should respond. (*See* Complaint, ¶¶ 12, 13, 20, 53-54, 57, 62, 64 and 66).

11. First, with respect to whether the Attorney General acted improperly in publicly announcing and disseminating allegations against Mr. Mason, that issue has no bearing on whether there has been or will be any Committee or judicial bias or unfair-

ness. Attorney General Abrams is not a member of the Committee, he has no connection with the operations or administration of this Office, and he is not a Justice of the Appellate Division. Mr. Mason has, in fact, filed a cross complaint with the Committee against the Attorney General, which complaint alleges that the latter's conduct was violative of the Disciplinary Rules of the Code of Professional Responsibility. But whatever the outcome of our investigation of Mr. Mason's complaint against Attorney General Abrams, the propriety of the Attorney General's conduct simply is irrelevant to the question whether Mr. Mason may obtain fair treatment or an impartial hearing before the Committee or the Appellate Division if formal charges are preferred against Mr. Mason. (It is noteworthy that despite Mr. Mason's protest of the Attorney General's actions in publicizing his complaint against Mr. Mason, Mr. Mason himself, in January, 1989, publicly announced that he had filed a complaint with the Committee regarding the impropriety of the Attorney General's actions.)

12. Second, the Committee acted in accordance with standard procedure in forwarding Attorney General Abrams's letter to Mr. Mason for his review and response. Section 605.6 of the DDC Rules allows the Office of Chief Counsel to formulate and transmit to the respondent attorney its own list of allegations or to forward allegations prepared by members of the public (former clients, other attorneys, judges). Our staff, in fact, is permitted to assist people who have difficulty in drafting their grievances. (*Id.*). Here, Attorney General Abrams's formulation was detailed as to the incidents in question and specific as to the Disciplinary Rules that such conduct assertedly violated. The Committee had previously received a much more general recitation of alleged wrongful conduct from a group of State legislators (*see* A 000236-37). Upon review, it was apparently determined that the Attorney General's more thorough account of alleged wrongful

conduct made an appropriate vehicle for consideration and response by Mr. Mason.[16]

13. As indicated below, plaintiff was allowed to withdraw his first response to the complaint forwarded to him and has as yet not filed a new one. (As the time for his response and deposition before the Committee drew near, Mr. Mason instituted the present action. The Committee has stipulated with plaintiff's counsel that, pending this Court's determination of the instant motion, plaintiff's response and appearance would be deferred.) Consequently, the Committee is still in its investigatory phase regarding the allegations brought against Mr. Mason and no determination has been made whether or not to file formal charges against him.

14. If, upon completion of the investigation of Mr. Mason (assuming that such investigation is not enjoined), the Office of Chief Counsel believes that a cautionary warning or some level of discipline is appropriate—letter of admonition or formal charges—that recommendation would be made to the Committee Chairperson and that person or a Committee member designated by him (the "Reviewing Member") would review the recommendation. (*See* 22 NYCRR § 605.6(e)&(f)). The Reviewing Member has the right to modify the recommendation, if appropriate, and any dispute that might result between the Reviewing Member and the Chief Counsel regarding such a modification, if not resolved, is referred to the Committee Chairperson for disposition. (*See* 22 NYCRR § 605.7). If the decision reached after initial review is

[16] That plaintiff continues to make the claim that the Committee's initial denial of an extension of the standard 20-day period to respond to the Attorney General's allegations (*see* 22 NYCRR §605.6(d)(2)) is indicative of bad faith or harassment (see Complaint ¶¶ 14-18) is surprising. First, plaintiff neglects to inform the Court that the denial was prompted, in large part, by the equivocal nature of the applicants' (not Mr. Mason's) authority to make the request. (*See* A 000129). Second, plaintiff was *ipso facto* granted additional time to respond by the Committee's affording him until January 9, 1989 to file supplemental material to the response purportedly filed on his behalf on the November 4, 1988 due date. Finally, the Appellate Division, First Department, granted Mr. Mason's first Article 78 petition allowing him to withdraw his first response and granting additional time to submit another.

to file formal charges, then the Office of Chief Counsel must, before charges can be filed, take the further step of obtaining written approval of an attorney member of the Committee's Policy Committee, a procedure which became effective on or about March 1, 1989. (The Policy Committee is comprised of seven Committee members, plus the Committee Chair, of whom five are attorneys).

15. If formal proceedings are approved at this level, then proceedings are commenced by the service of a Notice and Statement of Charges in a format prescribed by section 605.12 of the DDC Rules. Pursuant to that provision, the respondent attorney has the opportunity to answer the statement of charges and, in so doing, may raise any matters by way of defense or in mitigation thereof, or any constitutional objections to them. Following any pre-hearing stipulation, one of four Hearing Panels composed of Committees members (five lawyers, two lay members, though not to include the Reviewing Member or the complainant if a member of the Committee) is designated by the Chairperson to conduct the proceeding. The respondent attorney has the opportunity to raise objections to the participation of any designated panel member. (*See* 22 NYCRR §§ 605.12 & .13).

16. During the formal hearing, each party has the opportunity to make opening and closing statements, subpoena witnesses, and to present and object to evidence. A record is made of the entire proceeding. (*See* 22 NYCRR § 605.13).

17. Once the record is complete, the Hearing Panel decides whether the charges have been sustained. If sustained, the Hearing Panel recommends an appropriate sanction, the possibilities of which are: (i) private reprimand, (ii) referral to the Court, with a recommendation as to censure, suspension or disbarment, if deemed appropriate, and (iii) reprimand with referral to the Court, with a recommendation as to censure, suspension or disbarment, if deemed appropriate. The Hearing Panel thereupon

advises the parties of the determination. (*See* 22 NYCRR § 605.14(a)).

18. If a Hearing Panel refers a matter to the Court, this Office delivers to the respondent attorney proposed Findings of Fact and Conclusions of Law. The respondent attorney may submit counter proposed Findings and Conclusions. Conflicts between the two are resolved, in the first instance, by a designated member of the Hearing Panel. The Hearing Panel also may issue an Opinion. Once all this material is prepared, the papers are circulated to the entire Hearing Panel for final determination and issuance of a Hearing Panel Report. Briefs from the parties may be requested and reviewed in connection with the issuance of the Report, which, once finalized, is filed with this Office and served upon the respondent attorney. (*See* 22 NYCRR § 605.14(c)-(f)).

19. Whenever a Hearing Panel determines that a respondent attorney should be publicly disciplined, and a referral made, the Hearing Panel Report, the transcript and the documentary evidence are forwarded to the Appellate Division, First Department. (*See* 22 NYCRR § 605.15(e)). A regular panel of the First Department (five Justices) receives and reviews the entire record of the proceeding, as well as any petitions, cross-petitions and papers submitted in support thereof filed with it. Constitutional arguments may, of course, be addressed to the First Department and, upon compliance with section 5601 of the Civil Practice Law and Rules, to the Court of Appeals. Failing satisfaction there, a petition for certiorari may be filed to the United States Supreme Court.

20. Thus, as may be gleaned from the above, the proceedings against Mr. Mason are only in their infancy and may never move beyond the investigative stage. Moreover, Mr. Mason will have every opportunity to raise in the several levels of the state proceedings (should the matter proceed) the First Amendment and Civil Rights issues set forth in his federal complaint. Furthermore, because no determination whether to formally charge Mr.

Mason has been made—we are but in the initial investigatory stage—any pressure that Mr. Gentile perceived to move this matter along certainly will not have prejudiced me or my Office's present handling of the investigation.

21. Accordingly, it is respectfully submitted that plaintiff's motion for a preliminary injunction be denied and the instant complaint be dismissed.

/s/ Hal R. Lieberman

HAL R. LIEBERMAN

Sworn to before me this
20th day of June, 1989

/s/

Notary Public